

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of
SCARBOROUGH RADIO, LLC
For Construction Permit for
New FM Station, Hugo, Colorado
Facility I.D. No. 762662
NAL/Acct. No. MB-202141410061
FRN: 0015773476
File No. 0000161479

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 2, 2021

Released: December 2, 2021

By the Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Commission has before it the late-filed Form 2100, Schedule 301 application of ScarboroughRadio, LLC (Scarborough), for a new FM broadcast construction permit at Hugo, Colorado. In this Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (NAL), we find that Scarborough apparently willfully violated sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's rules by failing to timely file a post-auction Form 2100, Schedule 301 application. Based upon our review of the facts and circumstances before us, we conclude that Scarborough is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We also grant Scarborough a waiver of the long-form filing deadline and accept its application for filing.

II. BACKGROUND

2. On February 8, 2021, the Media Bureau and the Office of Economics and Analytics jointly released a Public Notice announcing a July 27, 2021, auction of AM and FM broadcast construction permits, Auction 109. Scarborough timely filed a FCC Form 175 application to participate in Auction 109, and was found to be a qualified bidder. By an August 12, 2021, Public Notice, the Bureaus announced that Scarborough was the winning bidder in Auction 109 for the FM construction permit at Hugo, Colorado. Winning bidders were to file a post-auction FCC Form 2100, Schedule 301

1 This NAL is issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (Act), and Section 1.80 of the Commission's rules. See 47 U.S.C. § 503(b); 47 CFR § 1.80. The Bureau has delegated authority to issue the NAL under Section 0.283 of the rules. See 47 CFR § 0.283.

2 See 47 CFR §§ 73.3573(f)(5)(i), 73.5005(a).

3 Auction of AM and FM Broadcast Construction Permits Scheduled for July 27, 2021; Comment Sought on Competitive Bidding Procedures for Auction 109, AU Docket No. 21-39, Public Notice, DA 21-131, 36 FCC Rcd 1409 (OEA/MB 2021).

4 Auction of AM and FM Broadcast Construction Permits; 114 Bidders Qualified to Participate in Auction 109, AU Docket No. 21-39, Public Notice, DA 21-780 (OEA/MB July 1, 2021).

long-form application by September 13, 2021. The *Auction 109 Closing Public Notice* cautioned that “[a] winning bidder that fails to submit the required long-form application before the specified deadline, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in section 1.2104(g) of the Commission’s rules.”⁶ Scarborough failed timely to submit a post-auction Form 2100, Schedule 301 application. Its Form 2100, Schedule 301 application (Application) was submitted on September 30, 2021. Scarborough did not request a waiver of sections 73.3573(f)(5)(i) and 73.5005(a) of the rules, or of the *Auction 109 Closing Public Notice*.⁷

III. DISCUSSION

3. *Waiver*. Ordinarily, a winning bidder that fails to timely file the required long-form application is deemed to have defaulted, its application is dismissed, and it is subject to the default payment set forth in section 1.2104(g) of the rules.⁸ However, the Commission may, for good cause, determine that a late-filed long-form application should be accepted.⁹ A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.¹⁰

4. The Commission has previously determined that an applicant has established good cause for a late-filed post-auction long-form application submission when minor, inadvertent, post-auction delinquencies did not disrupt the auction process, nor undermined the Commission’s policy of facilitating rapid implementation of service to the public.¹¹ We find that, notwithstanding its lack of a waiver request, Scarborough has met the standard for waiver of the application filing deadline applied in other, similar cases.¹² The record indicates that, prior to its late filing of the Form 2100, Schedule 301 application, Scarborough had complied with all previous Auction 109 requirements, including all filing and payment obligations, and was found to be a qualified bidder. While Scarborough did not discuss a filing deadline waiver with the staff prior to submitting its late-filed Application, the fact that it filed the Application shortly after making its rule-compliant late payment of the balance of its auction bid evidences a lack of

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⁵ *Auction of AM and FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction 109*, AU Docket No. 21-39, Public Notice, DA 21-983 (OEA/MB Aug. 12, 2021) (*Auction 109 Closing Public Notice*).

⁶ *Id.* at 8.

⁷ 47 CFR §§ 73.3573(f)(5)(i), 73.5005(a). These Sections require a winning bidder to file its long-form application within 30 days of the release of the public notice announcing the close of the auction, unless a longer period is specified in that closing public notice.

⁸ 47 CFR § 1.2104(g).

⁹ 47 CFR § 73.5005(c).

¹⁰ See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C.Cir 2008); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

¹¹ See, e.g., *Alfred L. “Pat” Roberson III*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 13-1860, 28 FCC Rcd 12933 (MB 2013) (waiver granted and forfeiture assessed, emphasizing compliance with all previous Auction 93 requirements, including all filing and payment obligations, and evidence of lack of bad faith); *Joseph C. Tesiero*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, DA 12-1004 (MB rel. June 27, 2012) (waiver granted and forfeiture assessed, giving considerable weight to applicant’s record of prior compliance with auction-related requirements); *Gulf Coast Community College*, 20 FCC Rcd 17157 (MB 2005); *Silver Palm Communications, Inc.*, 17 FCC Rcd 6606, 6607 (WTB 2002); *City Page & Cellular Services, Inc.*, 17 FCC Rcd 26109, 22611-12 (WTB 2002); *Pinpoint Communications, Inc.*, 14 FCC Rcd 6421 (WTB 1999).

¹² See *supra* note 11.

bad faith on its part.¹³ Furthermore, in reaching the conclusion to waive the filing deadline, we give considerable weight to Scarborough's record of prior compliance with auction-related requirements.

5. We also recognize that the FM licensing process was not significantly delayed nor materially adversely affected by Scarborough's late filing of the Application here. Accepting Scarborough's Form 2100, Schedule 301 application would not undermine the Commission's broadcast auction policies. Thus, flexibility is appropriate in this instance. We find it in the public interest to avoid a delay in implementing new service to Hugo, Colorado, by having to re-auction the FM construction permit, and therefore on our own motion grant a waiver as discussed below. Although we grant Scarborough a waiver of the rules that would otherwise require dismissal of its late-filed long-form application, and associated imposition of a default payment, we nonetheless find that it apparently failed to comply with the rules requiring timely submission of the post-auction Form 2100, Schedule 301 application. We will therefore grant the Application by separate action upon the conclusion of the forfeiture proceeding discussed below, if there are no issues other than the apparent violation that would preclude grant of the Application.

6. *Proposed Forfeiture.* In this case, Scarborough failed to timely file a post-auction Form 2100, Schedule 301 application, as required by sections 73.3573(f)(5)(i) and 73.5005(a) of the rules.

7. This *NAL* is issued pursuant to section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁴ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.¹⁵ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,¹⁶ and the Commission has so interpreted the term in the section 503(b) context.¹⁷

8. The Commission's *Forfeiture Policy Statement* and section 1.80(b)(10) of the Rules establish a base forfeiture amount of \$3,000 for the failure to file a required form.¹⁸ In determining the appropriate forfeiture amount, we must consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁹

9. In this case, Scarborough was on notice that it was responsible for timely submitting its post-auction Form 2100, Schedule 301 application, but failed timely to file its application. We also note that Scarborough neglected to request a waiver of the filing deadline, and did not provide an explanation for the tardy filing. Taking into consideration these facts and the factors required by section 503(b)(2)(D) of the Act and the *Forfeiture Policy Statement*, we propose a forfeiture in the full base amount of \$3,000.

¹³ See 47 CFR § 73.5003.

¹⁴ 47 U.S.C. § 503(b)(1)(B). See also 47 CFR § 1.80(a)(1).

¹⁵ 47 U.S.C. § 312(f)(1).

¹⁶ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁷ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁸ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999); 47 CFR § 1.80(b)(10), Table 1 to paragraph (b)(10).

¹⁹ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 CFR § 1.80(b)(10).

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that ScarboroughRadio, LLC IS HEREBY NOTIFIED OF ITS APPARENT LIABILITY FOR FORFEITURE in the amount of \$3,000 for its apparent willful violation of sections 73.3573(f)(5)(i) and 73.5005(a) of the Commission's rules.

11. IT IS FURTHER ORDERED that, pursuant to section 1.80 of the Commission's Rules, within thirty (30) days of the release date of this *NAL*, ScarboroughRadio, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

12. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),²⁰ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:²¹

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).²² For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the *NAL* Account – the bill number is the *NAL* Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a dollar limitation on credit card transactions, which cannot exceed \$24,999.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the *NAL* Account—the bill number is the *NAL* Account number with the first two digits excluded—and choose the "Pay from Bank Account" option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

13. The written response seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant

²⁰ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

²¹ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

²² Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.

to sections 1.16 and 1.80(g)(3) of the rules.²³ The written response must be filed with the Office of the Secretary, Federal Communications Commission, 45 L Street, NE, Washington, DC 20554, ATTN: Albert Shuldiner, Chief, Audio Division, Media Bureau, and **MUST INCLUDE** the NAL/Acct. No. referenced above. A courtesy copy should also be emailed to Lisa.Scanlan@fcc.gov to assist in processing the response.

14. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.²⁴

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted. Inability to pay, however, is only one of several factors that the Commission will consider in determining the appropriate forfeiture, and we have discretion to not reduce or cancel the forfeiture if other prongs of 47 U.S.C. § 503(b)(2)(E) support that result.²⁵

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 45 L Street, NE, Washington, DC 20554, or by e-mail at ARINQUIRIES@fcc.gov.²⁶ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

17. IT IS FURTHER ORDERED that, on its own motion, the Media Bureau HEREBY GRANTS WAIVER of the Form 2100, Schedule 301 Filing Deadline, and the Application will be processed in accordance with post-auction procedures.

²³ 47 CFR §§ 1.16 and 1.80(g)(3).

²⁴ Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

²⁵ *See, e.g., Adrian Abramovich*, Forfeiture Order, 33 FCC Rcd 4663, 4678-79, paras. 44-45 (2018).

²⁶ *See* 47 CFR § 1.1914.

18. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent by First Class and Certified Mail, Return Receipt Requested, to ScarboroughRadio, LLC, c/o Scott Scarborough, 3655 Amelia Island Street, Colorado Springs, CO 80920.

FEDERAL COMMUNICATIONS COMMISSION

Albert Shuldiner
Chief, Audio Division
Media Bureau